Supreme Court, U. S.
FILED
JUL 23 1977
MICHAEL RODAK, JR., CLERK

77-245

IN THE
# SUPREME COURT OF THE UNITED STATES
October Term, 1977

**NORTH SHORE TRAVEL SERVICE, INC.**
*Plaintiff-Petitioner,*

*– against –*

**JOSEPH F. HINTERSEHR, etc., et al.,**
*Defendants-Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

**HAROLD WARREN**
Counsel for Petitioner
16 Court Street
Brooklyn, New York
(212) 643-1335

**BERNARD MEYERSON**
On the Petition

TABLE OF CONTENTS


Page

Questions Presented . . . . . 2

Statement of Facts . . . . . 5

The Law . . . . . 7

POINT I. . . . . 15

POINT II. . . . . 17

POINT III. . . . . 20

POINT IV. . . . . 21

POINT V. . . . . 25

Reasons for Granting the Writ

1. The Court of Appeals for the Second Circuit has misconstrued and misconceived the opinion of this Court, in Erie v. Thompkins [304 U.S. 64], when it held a Replevin Judgment is Res Judicata and refused to apply the law enunciated by the highest court of the State of New York . . . . . 28

2. There is a direct conflict between the judgment here of the Court of Appeals, Second Circuit and the United States Court of Appeals, District of Columbia Circuit, which in the case of Grueninger International Travel v. Air Transport Association, 14 aviation case 17, 622 hold that "Section 414 does not grant immunity to the ATC or its member air carriers, except to the extent that their actions are authorized or approved. Its protection plainly does not extend to acts taken in violation of the very procedural





safeguards imposed by the CAB to ensure that the ATC actions would be taken on approved grounds " [note, judgment in above case was affirmed only because no damages resulted. Here the "life or death proposition" ended with the death of the Petitioner travel agency]. . . . . 28

3. There is direct conflict between the Court of Appeals, Second Circuit and the 8th Circuit as to the requirements for summary judgment, [ Ozark Milling Corp., v. Allied Mills, Inc., 480 F 2d 1014 ] since here the motion was really a demurrer and made prior to examination or discovery under rules of the Federal Court, Rule 26[b], therefore, admitting the allegations of the complaint showed a controversy which deprived appellee of the extreme remedy of summary judgment. . . . . 29

4. The Court of Appeals, Second Circuit, has refused to follow the rule of this Court [Fay v. Nora, 372 U. S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837], that a void judgment can be collaterally impeached as it ignored the action of the District Court on newly discovered evidence [Appendix 130a] which indicated the judgment was void, but the District Court granted judgment before same could be clarified . . . . . 29

Conclusion. . . . . 30

Appendix A - Order and Judgment of the United States Court of Appeals for the Second Circuit . . . . . .A-1

Appendix B - Final Judgment of the United States District Court, Eastern District of New York . . . . . .A-3

Appendix C - Opinion of Judge Jacob Mishler. . . . . .A-4

TABLE OF CASES

Lowe Trustee v. International Air Transport Association, et al., 13 aviation case 18, 214 . . . . . 7-15

Hughes Tool Co., v. Trans World Airlines, Inc., 409 U.S. 363 . . . 9, 15

Roach v. Curtis, 191 N.Y. 387 . . . 18, 19

Antar v. T.W.A., 66 Misc. 2d 93 affirmed 37 App. Div. 2d 921 . . . 5, 22

LaPrease v. Raymours Furniture Company, 315 F.S. 716 . . . . . 22

Sanks v. Georgia, 399 U.S. 922; 400 U.S. 914; 401 U.S. 144 . . . . 22

Proctor & Gamble v. Lawrence Am. Field Warehouse Corp., 16 N.Y. 2d 344 . . . . . 27

Erie v. Thompkins, 304 U.S. 64 . . 28

Grueninger International Travel v. Air Transport Association, 14 aviation case 17, 622 . . . . . 28



Ozark Milling Corp., v. Allied Mills, Inc., 480 F 2d 1014 . . . . . 29

Fay v. Nora, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837. . . . . 29

Other Authority

Moore's Federal Practice - Vol. I., "Res Judicata defined". . . . . 17, 18

Carmody-Wait, Second Edition, Chapter 82, Section 82:187, "Conclusiveness on, and effect as res judicata against defendant" . . . . 19

The New York Civil Practice Law & Rules, Section 2104 . . . . . 24

Rule 26[b]. . . . . 25

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

---

NORTH SHORE TRAVEL SERVICE, INC.,
Plaintiff-Petitioner,

- against -

JOSEPH F. HINTERSEHR, etc., et al.,
Defendants-Respondents.

---

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, North Shore Travel Service, Inc., prays that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, which affirmed a final judgment entered in the United



States District Court for the Eastern District of New York on April 25, 1977 by the Honorable Jacob Mishler, District Judge, which grants summary judgment [before the joinder of issue] and dismisses the Complaint.

There was no opinion of the Court of Appeals reported. The said Court affirmed on the opinion of Chief Judge Mishler, dated September 21, 1976, even though the opinion contains a wrong interpretation, that a reference to a date of a bulletin [Aug. 9th] in the telegram from American Airlines [161a] was the date that the telegram was sent [136a], when the telegram was actually sent on the 16th day [Aug. 20th] or one day after the 15 day period of suspension had expired [54a].

Involved is the question whether the deliberate, vicious acts of the agents of the Air Traffic Conference [ATC], which put appellant out of business, are exempt from the Anti-trust Law by virtue of Section 414 of the Federal Aviation Act.

## QUESTIONS PRESENTED

I. Does Section 414 of the Federal Aviation Law give the Air Traffic Conference [ATC] immunity from the Anti-trust Laws when it:

[a] Violates its own rules as to suspension and refuses to lift the suspension because of an unexplained personal grievance, which was sent and received after the time limit expired ?

[b] Started a replevin proceeding with a void writ of seizure (undertaking not executed by surety, as ordered) in order to get same in the newspaper, then sends its representative with the newspaper release to North Shore's accounts to panic its customers to start a "run" for refunds, and then refuses to redeem the refunded tickets returned to them in order to impoverish Petitioner ?

[c] Allows only one insurance company to bond its agents, then dictates to the company and has it do wrongful acts such as cancelling an Irrevocable Letter of Credit without the knowledge of North Shore Travel [a violation of Section 5-106[2] of the Uniform Commercial Code], and suddenly cancelling North Shore's ATC Bond without returning the unused premium so as to aid the ATC in destroying North Shore Travel ?

II. Can summary judgment be granted before the joinder of issue where the evidence necessary to prove a plaintiff's case is solely within the knowledge of the defendants, and that such evidence can only be procured by an examination before trial ?



III. Can a judgment in a replevin action, that holds that because of a 15 day suspension the plaintiff is entitled to the tickets replevined, be res judicata of an Anti-trust action where the trial court had excluded any evidence of anti-trust practices, as not within the issues ?

## STATEMENT OF FACTS.

Plaintiff travel agency brought this action against the Air Transport Association of America [ATA] and a number of airlines who are part of this association of air carriers, seeking treble damages on the basis of violations of the Sherman Act, 15 USC, Sections 1 and 2 on the ground that the termination of plaintiff's right to do business was a group boycott.

The events herein started when counsel for the ATA vowed to get North Shore Travel [76a]. This was done by rushing North Shore's check to the bank instead of through the usual channels, and having the check returned marked "drawn on uncollected funds" while a Notice was sent to North Shore stating that the check was paid [78a]. A Replevin Action was commenced with a writ of Seizure and Plaintiff was then suspended for 15 days. The value of the blank tickets (which were of no value [Antar v. T.W.A., 66 Misc. 2d 93 aff'd. 37 App. Div. 2d 921] ) was fixed in the writ as worth $452,000 thus North Shore would have needed a bond of nearly one-million dollars to get these tickets back [this was unconstitutional].

The demand was made by North Shore Travel's counsel that a bond be filed before the writ of



seizure be issued [127a]. The writ recited that the bond was filed [127a]. However, the bond was never filed and the Sheriff was fraudulently induced to seize these useless blank tickets. This seizure was put into the newspaper [160a] and some individual, on behalf of ATA, who knew who plaintiff's clients were, went to these clients with the newspaper clipping [73a]. This, of course, created panic among the clients and they ran to plaintiff for refunds in the amount of over $9,000. As part of the scheme to deprive plaintiff of funds, ATA has refused to refund this money. It claims more is owed to it but has never given plaintiff any specific proof of same [126a].

Plaintiff applied to be reinstated when suspended and not one airline opposed it within the required fifteen (15) day period. On the 16th day, however, American Airlines sent a teletype requesting that North Shore's reinstatement be held off. [It was admitted on trial that no moneys were owed American Airlines and that the teletype was sent out of spite (54a, 97a) ].

All agencies must be bonded and Marsh & McLennan of Washington, D.C. have the monopoly of these bonds, known as ATC Schedule Bond,

and thus must take their orders from the Air Traffic Conference [ATC] [76a], a division of ATA. Marsh & McLennan first aided ATC in its replevin suit [77a] and then it cancelled its bond at the request of ATC so plaintiff could be indefinitely suspended [87a]. However, this cancellation of bond was void [87a, 88a] and thus this indefinite suspension also was a violation of the Sherman Anti-trust Act but it had the effect of putting plaintiff out of business.

THE LAW.

The Sherman Anti-trust Law is well known to the bench and bar. However, these defendants normally come under the exceptions to the Law. A similar case came before the Judge Stewart in the Southern District Court, in the case of Lowe Trustee v. International Air Transport Association, et al., 13 Avi 18, 214. This opinion, in great detail, covers all the statutes and cases that deal with this subject and, in the opinion of the writer of this Petition, it is the best treatise on this specialized part of the law that is available at this time. Some excerpts of the opinion will be quoted for the convenience of this Court:

"Shortly thereafter it appears that Pan Am informed the IATA that it had declared



Hefler in default. This triggered a review of Hefler's status by the Agency Administration Board ["AAB"], the subcommittee of the IATA authorized under Resolution 810a to approve or disapprove travel agents."

"* * * The testimony is in complete agreement that there was no discussion of Hefler's rebuttal materials or any consideration of the issues Hefler raised, at this meeting."

The other important parts of the Opinion are as follows:

"When considering whether the aforementioned violations of the CAB requirements result in a loss of defendants' statutory grant of antitrust immunity, we note that the courts have consistently demanded strict compliance with prescribed procedures in order for immunity to attach. [3/] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1939); Chicago & N.W. Ry. Co. v. Peoria & P.U. Ry. Co., 201 F. Supp. 241 (S.D. Ill. 1962). As the Supreme Court said in Socony,

"Congress had specified the precise manner and method of securing immunity. None other would suffice." (310 U.S. at 226-7).

"3/ Our situation is very different from that in Hughes Tool Co. v. Trans World Airlines, Inc., 409 U.S. 363 (1973), reh. den. 410 U.S. 975 (1973), where the proper CAB approval procedures had been carefully followed, and the Court was faced with the question of whether statutory immunity from the operations of the antitrust law did not apply to defendants' actions because they involved matters beyond the scope of the CAB's Congressional mandate and thus beyond its power to approve and confer immunity.

"In the instant case, the method by which defendants could have secured antitrust immunity for their action of cancelling a travel agent's approval has been specified by the CAB which has set forth the particular procedures which have to be followed. 29 CAB 264-4; 33 CAB 170; Resolution 810a-C. The CAB also detailed the reasons for requiring strict compliance with these procedures:

> It must always be realized that this entire system of joint carrier screening of travel agencies is a substantial departure from the normal free competitive practices of our economy, and that it would be clearly in violation of the Federal antitrust laws were it not for the immunity extended by section 414



> of the Act. This is not a situation, therefore, where we can grant to the carriers on the basis of management expertise or discretion substantial freedom to make decisions without detailed Board supervision and control.

29 CAB at 264-5.

"The particular importance of the CAB mandated due process 4/ requirements was underscored when the Board stated:

> Through the ATC [and IATA] system the carriers hold life and death power over the travel agencies and it is unthinkable that the carriers should exercise these powers without giving full notice of their reasons and providing ample opportunity for appeal.

29 CAB at 264-5.

---

"4/ In this connection, we are aware of the importance placed on procedural safeguards by the Supreme Court when considering whether certain actions could be covered by an implied repeal of the antitrust laws. Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

"Further, less than six months before the IATA began its review of Hefler, the District Court concluded in Caceres, supra, in which the IATA were defendants, that antitrust immunity would be eliminated where the notice which the IATA sent a rejected agent failed to comply with the terms of the CAB approval of Resolution 810a. 46 F.R.D. at 93. Defendants had thus been instructed as to the probable consequence to their antitrust immunity should they fail to comply with the CAB procedures.

" * * * IATA, have adopted Resolution 810a in which they agreed that agents like Hefler must have IATA approval in order to be eligible to receive commissions from the air carriers on international air ticket sales, and in order to conduct business with the carriers on a credit basis (Resolution 810a-1 (1); tr. at 11-14, 249-53). Pursuant to the terms of Resolution 810a, defendants have further agreed that "cancellation of approval of any agent ... by the appropriate [IATA] Agency Sub-Committee shall be honored by all Members of IATA" [Resolution 810a-C(9)].

"Since no one may sell air transportation tickets at a rate other than that approved by the CAB (49 U.S.C. Section 1373), travel



agents only make money from such sales through commissions paid by the air carriers (tr. at 11-14). Thus, the cancellation of Hefler's approval by the IATA, and the honoring of this decision by the member carriers, effectively precluded Hefler from doing business as a retailer of international air transportation (Caceres, supra, 46 F.R.D. at 90; 29 CAB at 264-5).

"Clearly, the fact that all defendant carriers are bound to honor the AAB's decision to cancel deprives them of the freedom to decide independently whether they want to deal with Hefler, and if so, under what terms. Consequently, defendants' implimentation of their Resolution 810a agreement constitutes a concerted refusal to deal with Hefler under the * * * "

" * * * terms and conditions extended to other travel agents, and thus constitutes a group boycott by competitors. Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959); Radiant Burners, Inc. v. Peoples Gas Co., 364 U.S. 656, 81 S. Ct. 365, 5L Ed. 2d 358 (1961); Vandervelde v. Put and Call Brokers and Dealers Ass'n., 344 F. Supp. 118, 139 (S.D. N.Y. 1972). Such boycotts have been gen-

erally held to be per se violations of Section 1 of the Sherman Act. Klor's, supra; Northern Pacific Ry. v. United States, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958).

"Exceptions to the per se rule have been recognized where trade association boycotts have been determined to be reasonable in furtherance of legitimate policies. Deesen v. Professional Golfers' Ass'n. of America, 358 F. 2d 165 (9th Cir. 1966), cert. denied 385 U.S. 846 (1966), reh. denied 385 U.S. 1032 (1967), Bridge Corp. of America v. America Contract Bridge League, Inc., 428 F. 2d 1365 (9th Cir. 1970), cert. denied 401 U.S. 940 (1971). In the instant case, however, the CAB has already determined that public policy is only furthered when defendants afford agents like Hefler procedural safeguards before they exercise their power to review and terminate an agent's approval (29 CAB at 262-65; 33 CAB 170-71). Thus no doctrine of reasonableness can save the boycott here. As the court in Caceres, supra, reasoned:

> "[W]hether redeeming social good flows from the IATA arrangements has already been considered by the CAB which has set



> limits to the manner in which these useful purposes may be carried out. See 33 CAB 262-65. If the airlines, through IATA, have exceeded these limits, they cannot, it seems, fall back on the same justifications they relied on to obtain the Board's [original] approval..."

46 F.R.D. at 92-3n. 1. See Denver Rockets v. All-Pro Management, Inc., 325 F. Supp. 1049 (C.D. Cal. 1971) and McCreery Angus Farms v. American Angus Ass'n. 379 F. Supp. 1008 (S.D. Ill. 1974) where the lack of procedural safeguards was a pivotal factor in finding alleged boycotts unreasonable and violative of Section 1.

"We conclude, therefore, that defendants' actions constitute violations of Section 1 of the Sherman Act.

"As interpreted by the courts, the offense of actual monopolization under Section 2 of the Act requires that the defendants possess (1) monoply power in the relevant market, and (2) the intent and purpose to exercise that power to exclude competition. United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 92 L. Ed. 1236 (1948); United States v. Grinnell Corp., 384 U.S. 563,

86 S. Ct. 1698, 16 L. Ed. 2d 778 (1966); United States v. Aluminum Co. of America, 148 F. 2d 416 (2d Cir. 1945)."

"Monopoly power is defined as the power to control prices or exclude competition from the relevant market. Grinnell, supra, 384 U. S. at 571; United States v. E. I. DuPont * * * "

In Hughes Tool Co., v. Trans World Airlines, 409 U.S. 363 the opinion of this Court, on page 389 stated:

"We by no means hold that the Federal Aviation Act completely displaces the antitrust laws. * * * "

## POINT I.

The trial in the New York Supreme Court was limited to the issue whether North Shore Travel had earned enough demerits to warrant a fifteen (15) day suspension. But North Shore Travel is still out of business so how can the judgment in the Supreme Court be res judicata [142a] of the fact that North Shore Travel is still denied the right to do business more than two (2) years later.

The original suspension was only for fifteen



(15) days [133a], and the statement contained in the Opinion of Judge Mishler, that:

"the telegram was received from American Airlines only 12 days later" [136a],

is erroneous. Judge Mishler was unaware that the telegram, from American Airlines to Darlene Dolan at the ATC [161a], was sent on August 20th, not on August 9th, and mistook the date of a bulletin (August 9th) referenced in the first line of the message, sent to ATC [161a], as being the date of the telegram:

"RE A.B.634 AUG 9 NORTH SHORE TVL SVC * * * "

It has never been denied, through the different proceedings, that the telegram was sent and received on the sixteenth (16th) day [54a], nor has it been denied that the Replevin trial revealed that no moneys were owed American Airlines and that the telegram was sent as the result of personal spite [97a]. Certainly this act alone was a violation of the Sherman Anti-trust Act.

It was not denied below that travel agents must secure a bond to maintain the right to sell airline tickets. That this bond could only be secured through Marsh & McLennan, Washington, D.C., and that because of this tie, the ATC has great influence with the company [76a]. Conse-

quently, the actions of the bonding company were the actions of ATC [76a]. Therefore, when it was necessary to aid ATC, to get the Bank in Nassau to cooperate, the bonding company, suddenly and without notice to appellant, cancelled the bank's Irrevocable Letter of Credit issued on behalf of North Shore Travel against its ATC Bond [77a]. (This is in violation of Uniform Commercial Code of New York State, Section 5-106[2] ). Then, in furtherance of the scheme to put North Shore out of business, ATC had its subservant insurance company attempt to cancel North Shore's ATC Bond, which purported to give ATC the right to revoke North Shore Travel's right to do business. However, the revocation of the bond was a nullity [87a, 88a] and the acts of ATC was another violation of the Sherman Anti-trust Law.

## POINT II.

The replevin action was not res judicata of the instant action.

In Moore's Federal Practice, Vol. I., "Res Judicata defined", the following is found on page 24:

"If the judgment is in rem or quasi in rem, the judgment does not merge any in personam claim its plaintiff may have, not operate



as a bar to such claim [22]."

The Judgment of Replevin was rendered in a New York State Court, and the New York Court of Appeals held to the same effect in Roach v, Curtis, 191 N.Y. 387, where the opinion of Willard Bartlett contained the following, at page 390:

"We are of the opinion that the judgment in replevin did not preclude the vendee from maintaining this suit. The action of replevin is essentially possessory in its nature. (Sinnott v. Feiock, 165 N.Y. 444). The issue litigated in a replevin suit is the present right to the possession of the property in controversy. Under the contract of sale on the installment plan between these parties, no title whatever had vested in the vendee at the time when the vendors thus sued her for the recovery of the goods (Empire State T.F. Co. v. Grant, 114 N.Y. 40), and hence she had no defense to that action. The judgment therein simply determined that the vendors were entitled to the possession of the property which was the subject of the conditional sale and that determination had no bearing, directly or indirectly, upon her right under the statute to recover what she had paid on account of the purchase, in the event of the

vendors' failure to sell the same after they had retaken it. The adjudication in the replevin suit was, therefore, no bar to her present claim and the trial court properly declined to give it effect as such."

The foremost authority in New York State is that of Carmody-Wait, Second Edition where the following is found in Chapter 82, Section 82:187:

"Conclusiveness on, and effect as res judicata against, defendant.

The defendant in an action to recover a chattel is not barred by judgment against him from pursuing any other rights he may have aside from those based upon the right of possession. Thus, a judgment for possession of conditionally sold goods in favor of the vendor did not preclude the defendant purchaser from pursuing his statutory right to recover installments paid if the seller failed to resell the goods for the buyer's benefit in manner and time as then prescribed by law. * * *"

The Justice who tried the replevin action in the Supreme Court, Nassau County was well aware of this law as he refused to allow North Shore Travel to use violations of the Anti-trust Law as a defense in the replevin action:



"THE COURT: In order that the record may reflect a conference that was held in chambers, I have advised the attorney for the defendant that I am not going to permit him to enter testimony relative to the Civil Aeronautics Board's attitude towards the ATC as to whether their practices are regular or irregular, because I feel that it has no probative value in the case at all. You may have your exception accordingly, Mr. Broderick.

You may proceed, counselor." [83a].

## POINT III.

The defendants are liable to plaintiff for failing to lift the suspension after no one protested against same with the fifteen (15) day period.

The suspension was based upon a check being returned for "uncollected funds" after this check was rushed to the appellant's bank ahead of time, and instead of through the usual channels (check was processed differently from other agent's checks). But the bank had misled North Shore Travel by sending them a Notice stating that the check had been "paid" and thus prevented North Shore from going to the bank

and demanding that same be paid at a time before North Shore's Bankbook and hypothecation had been subpoenaed to court and deliberately destroyed by the person who had received this vital evidence from another employee of the bank [106a]. North Shore asked to be reinstated [133a] on this ground, and within fifteen (15) days not one airline opposed the reinstatement. However, in spite of the rules, North Shore Travel was not reinstated because on the sixteenth (16th) day American Airlines opposed same without explanation, although to the knowledge of plaintiff's officers this opposition was based on personal grievances and not on reasonable grounds [97a] (this is not denied by appellee, see Complaint [152a]). Testimony at the trial showed that the American Airlines representative admitted receiving full payment from North Shore and that North Shore did not owe American Airlines one-cent [97a]. This certainly was an action that deprived defendants, the ATC, of their immunity under the Sherman Law.

## POINT IV.

The writ of seizure in terms violated the constitution of the United States, however, this question cannot be pressed because execution was fraudulently issued in defendants' haste to destroy North Shore's business.



The Court below stated that North Shore Travel's challenge on the valitity of the writ could be challenged on certeorari [143a]. Actually, the time to do so has not even matured so the court could have granted such relief. The reason that same is unconstitutional is that under New York State Law, appellant had to provide a double bond, which was an impossibility for any ordinary travel agency, like North Shore, to raise a one-million dollar bond. (Actually, the blank tickets were useless and had no value; Antar v. T.W.A., 66 Misc. 2d 93 aff'd. 37 App. Div. 2d 921). In the case of LaPrease v. Raymours Furniture Co., 315 F.S. 716, the three-man Constitutional Court held that such a bond took them "into a murky and uncertain area" but it withheld judgment because the same question was before the Supreme Court of the United States in Sanks v. Georgia. However, before the Supreme Court could decide, the Legislature of the State of Georgia changed the law and made the question academic, so the Supreme Court saw no reason to rule on the subject:

Sanks v. Georgia, 399 U.S. 922; 400 U.S. 914; 401 U.S. 144.

However, there has been a shocking revelation herein [86a] that, although the demand was made by North Shore's counsel that a bond be filed before the writ of seizure be issued [127a] and that the writ recited that the bond was filed [127a], no bond was posted by appellee and no stipulation waiving same was offered by appellees' counsel. Counsel for North Shore moved on this ground and under the assumption that, Hintersehr, etc., had posted a bond [86a]. The minutes of the hearing on the preliminary proceeding to granting the writ of Replevin read:

"MR. BRODERICK: I won't consent to anything. Plaintiff has to submit the bond. [to] the Sheriff pursuant to Court order, the Sheriff is to hold these bonds [the chattels] pending determination of the trial." [127a].

This was followed by the Order of Seizure of the Honorable Beatrice S. Burstein, dated August 1, 1974, and that this Order contained the following:

"AND, it further appearing that an undertaking executed by sufficient surety as required by law having been submitted herewith," [127a].



Further, the New York Civil Practice Law and Rules, Section 2104, reads as follows:

"An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered."

No such order or stipulation was offered by defendants herein, the ATC's counsel. Thus, the Sheriff was fraudulently induced to go out with the writ to appellant's place of business [86a].

The reason for this fraud and rush was to get the information, regarding the seizure, in the newspapers [160a] for the purpose of causing a "run" on appellant to redeem issued tickets (after appellees' agent showed this newspaper release to North Shore's accounts [73a]), which this appellant did to the extent of $9,000 [73a].

The Appellees have refused to refund this money to appellant, and their opposition carefully only states generalities and refuse to specifically point out a single dollar owed to them [126a]. Consequently, this was another method illegally employed to put the plaintiff out of business by causing them to lose their monetary assets.

## POINT V.

By making a motion for summary judgment, before serving their answer, appellees have prevented Petitioner from discovery proceeding and then claimed that Petitioner only has suspicions, when they well know that the knowledge of its acts, that is necessary to defeat the motion for summary judgment, can only be gained by discovery and interrogatories.

Rule 26[b] reads as follows:

"11 (b) Scope of Discovery. Unless otherwise limited
12 by order of the court in accordance with these rules,
13 the scope of discovery is as follows:
14 (1) In General, Parties may obtain discovery regard-
15 ing any matter, not privileged, which is relevant to the
16 subject matter involved in the pending action, whether
17 it relates to the claim or defense of the party seeking
18 discovery or to the claim or defense of any other party,
19 including the existence, description,



nature, custody, con-
20 dition and location of any books, documents, or other
21 tangible things and the identity and location of persons
22 having knowledge of any discoverable matter. It is not
23 ground for objection that the information sought will
24 be inadmissible at the trial if the information sought
25 appears reasonably calculated to lead to the discovery
26 of admissible evidence."

In March, 1933, the Second Circuit Court held that an action for damages under the Anti-trust Law is not for a penalty, and a bill of discovery may be maintained. But, of what use is the rule if a defendant can make a motion for a summary judgment before the answer is served, and thereby prevent the plaintiff from bringing discovery proceeding or demanding interrogatories ?

There is no doubt that the answers to the Court's claim, that there were allegations of suspicions, only referred to material solely in the knowledge and possession of appellees, and

the motion should have been denied on that ground. The New York Court of Appeals has held to this effect, in the case of Proctor & Gamble v. Lawrence Am. Field Warehouse Corp., 16 NY 2d 344, (the famous "salad oil" case) where the opinion of Van Voorhis J., contained the following, on Page 362:

> " * * * We have held that summary judgment is not justified where there are likely to be defenses that depend upon knowledge in the possession of the party moving for judgment, which might well be disclosed by cross-examination or examination before trial (Kamen v. Metropolitan Life Ins. Co., 6 AD 2d 406, aff'd. 6 NY 2d 737; Suslensky v. Metropolitan Life Ins. Co., 180 Misc. 624, aff'd. 267 App. Div. 812; West Virginia Pulp & Paper Co., v. Merchants Mut. Ins. Co., 10 AD 2d 451; 5 Carmody-Wait, New York Practice, P. 145). For this reason, we hold that the Appellate Division correctly decided that a triable issue is presented on the second cause of action whether plaintiff's vegetable oil was converted by the transfer of custody * * * "



## REASONS FOR GRANTING THE WRIT

1. The Court of Appeals for the Second Circuit has misconstrued and misconceived the opinion of this Court in Erie v. Thompkins [304 U.S. 64] when it held a Replevin Judgment is Res Judicata and refused to apply the law enunciated by the highest court of the State of New York.

2. There is a direct conflict between the judgment here of the Court of Appeals, Second Circuit and the United States Court of Appeals, District of Columbia Circuit, which in the case of Grueninger International Travel v. Air Transport Association, 14 aviation case 17, 622 hold that "Section 414 does not grant immunity to the ATC or its member air carriers, except to the extent that their actions are authorized or approved. Its protection plainly does not extend to acts taken in violation of the very procedural safeguards imposed by the CAB to ensure that the ATC actions would be taken on approved grounds" [note, judgment in above case was affirmed only because no damages resulted. Here the "life or death proposition" ended with the death of the Petitioner travel agency.]

3. There is direct conflict between the Court of Appeals, Second Circuit and the 8th Circuit as to the requirements for summary judgment, [Ozark Milling Corp., v. Allied Mills, Inc., 480 F 2d 1014] since here the motion was really a demurrer and made prior to examination or discovery under rules of the Federal Court, Rule 26[b], therefore, admitting the allegations of the complaint showed a controversy which deprived appellee of the extreme remedy of summary judgment.

4. The Court of Appeals, Second Circuit, has refused to follow the rule of this Court [Fay v. Nora, 372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837], that a void judgment can be collaterally impeached as it ignored the action of the District Court on newly discovered evidence [p. 130a in Appendix] which indicated the judgment was void, but the District Court granted judgment before same could be clarified.



## CONCLUSION

WHEREFORE, the petitioner prays that a Writ of Certiorari should be issued to review the judgment of the Second Circuit.

Respectfully submitted,

Harold Warren
Counsel for Petitioner

Bernard Meyerson
On the Petition

APPENDIX A

United States Court of Appeals for the
Second Circuit

---

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fifth day of April, one thousand nine hundred and seventy-seven.

Present: HON. STERRY R. WATERMAN
HON. J. JOSEPH SMITH
HON. WILFRED FEINBERG
Circuit Judges,

---

NORTH SHORE TRAVEL SERVICE, INC.,
Plaintiff-Appellant,

- against -

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, et al.,
Defendants-Appellees.

---

Appeal from the United States District Court for the Eastern District of New York.



This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed on the opinion of Chief Judge Mishler, dated September 21, 1976.

A. DANIEL FUSARO
Clerk

APPENDIX B

(144a)

FINAL JUDGMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

- against -

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, et al.,

Defendants.

---

A memorandum and order of Honorable Jacob Mishler, United States District Judge, having been filed on September 22, 1976, granting defendants' motion for summary judgment and denying plaintiff's cross-motion for partial summary judgment, it is

ORDERED AND ADJUDGED that plaintiff take nothing of the defendants and that defendants' motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied.

Dated: Brooklyn, New York
September 22, 1976

LEWIS ORGEL
Clerk



APPENDIX C

(131a)

OPINION OF JUDGE JACOB MISHLER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

---

NORTH SHORE TRAVEL SERVICE, INC.,

Plaintiff,

- against -

JOSEPH F. HINTERSEHR, as Treasurer of the Air Transport Association of America, et al.,

Defendants.

---

September 21, 1976

MISHLER, CH. J.

Plaintiff commenced this action seeking damages resulting from alleged antitrust violations committed by defendants, and requesting the empaneling of a three-judge court, pursuant to 28 U.S.C. §2281, to determine the constitutionality of New York State's statutory replevin procedures, CPLR §7101 et seq. Pursuant to Rule 56, defendants have moved for summary judgment, and plaintiff has cross-moved for partial summary judgment.

Plaintiff, a New York corporation, operates as a travel agency in Syosset, New York. The defendants collectively are officers of the Air Transport Association of America (ATAA), an association of air carriers, and officers of the Air Traffic Conference of America (ATC), and Airline Finance and Accounting Conference (AFC), both of which are divisions of ATAA. The ATAA exists as a non-governmental organization operating with Civil Aeronautics Board (CAB) authorization. The ATC division acts as agent for the airlines in their transactions with travel agencies, which reserve and sell airline transportation to individual customers. Governing the relationships of the parties is a resolution, authorized by the CAB, known as the ATC Sales Agency Agreement. These agreements in short, operate to





appoint travel agencies such as North Shore, trustees of the airlines, empowering them to hold the airline's tickets for sale to the public. Under the agreement proceeds of an agency's sales, less commissions, are to be remitted to the airlines three times monthly. The contract further provides for the suspension and termination of a travel agency's certification upon breach of the agreement's operating terms; four late remittances within any twelve month period constitute sufficient grounds. Upon suspension, the agency must surrender the airline tickets it holds until reinstatement.

Pursuant to 49 U.S.C. §1382, the agreements and resolutions were filed with and approved by the CAB. In accordance with 49 U.S.C. §1384, such approval ordinarily serves to immunize the authorized groups from operation of the "antitrust laws," thereby enabling them to engage in activities consistent with the agrement that might otherwise be unlawful. However, such statutory immunity is not absolute. If a claim is made that the procedures thus approved are subsequently perverted to accomplish some result not within the Board's contemplation, it is arguable that the statutory protections should fall. See Hughes Tool Co. v.

Trans World Airlines, Inc., 409 U.S. 363, 93 S.Ct. 647 (1973), rehearing denied, 410 U.S. 975, 93 S.Ct. 1434 (1973); Caceres v. International Air Transport Assn., 46 F.R.D. 89 (1969). Putnam v. Air Transport Assn. of America, 112 F. Supp. 885 (S.D.N.Y. 1953). It is plaintiff's contention that certain of defendants' actions exceeded the scope of procedures authorized by the CAB and therefore, the statutory immunity otherwise afforded by 49 U.S.C. §1384 should fail. As such, plaintiff argues, defendants should be held liable for damages caused by alleged violations of the antitrust laws.

Pursuant to contractual notice provisions, a letter dated July 29, 1974, was forwarded from ATC offices apprising North Shore Travel of ATC's decision to suspend the then existing Agency Agreement. The ATC stated as its basis for the suspension, North Shore Travel's accumulation of five "late remittance charges"[/1] within a twelve-month period.

---

/1 An agent could be charged with a "single late remittance charge" if he failed to timely remit proceeds or could be charged with two "late remittance charges" should a check be dishonored.



This suspension notice, however, had been preceded by an attempt to cancel North Shore's privileges after the May 31st reporting period. When North Shore had refused to surrender its tickets pursuant to the Agency Agreement, the ATC commenced an action in Nassau County Supreme Court to recover possession of airline tickets and related sales paraphernalia which was in North Shore's possession. ATC had based that suspension upon North Shore's alleged accumulation of four "late remittance charges" within a twelve-month period. North Shore counterclaimed alleging that ATC had acted in a willful, intentional and malicious manner in suspending North Shore's privileges and that ATC had breached a fiduciary relationship in initiating the replevin action before notifying North Shore.

An opinion by Justice DePaolo held that only the "late remittance charges" for the periods ending April 30, 1974 and May 31, 1974 were proper. Finding, therefore, that only three "late remittance charges" remained outstanding, one less than was required by the agreement in order to suspend North Shore's operations, the court dismissed ATC's action. Justice DePaolo also dismissed the counterclaims as North Shore failed to establish any of its claims.

The July 29th letter cited the three charges found valid by Justice DePaolo, as well as two "late remittance charges" incurred during July 1974, as the basis for suspending North Shore's operations. In response, North Shore filed an immediate request for reinstatement in accordance with Agency Agreement provisions.[12] In conjunction with the suspension, ATC again commenced a replevin action in Nassau County Supreme Court when a demand for the surrender of the ticket stock was refused.

On August 1, 1974, after a hearing at which both the ATC and North Shore were present, Justice Burstein signed an order authorizing seizure of the airline tickets in North Shore's possession. Justice Burstein found that ATC had shown sufficient facts to satisfy the due process requirements of the fourteenth amendment and as such, seizure was proper.

---

[12] Under the terms of the operating Sales Agency Agreement, a suspended travel agent may file a request for reinstatement. Such a request is immediately transmitted to the member airlines, and they are asked to forward their objections. If within fifteen days no member airline requests the matter be held for review, automatic reinstatement is effected. Herein, North Shore filed for reinstatement on the same date it received the suspension notice, July 29, 1974. Twelve days later, on August 9, 1974, American Airlines teletyped ATC offices requesting reinstatement be held up.





North Shore next impleaded into the action, the Hempstead Bank, where it retained its checking account. North Shore alleged that the ATC induced the bank to breach its contract with North Shore, and that as a result, the bank willfully and maliciously dishonored the checks leading to the citation of the "late remittance charges" and the suspension. A short time later, during trial preparations, ATC was informed by the Insurance Company of North America that North Shore's surety bond, required by the Sales Agency Agreement, was to be cancelled. ATC, by letter dated August 7, 1974, informed North Shore, that, pursuant to the provisions of the Sales Agency Agreement, ATC would terminate North Shore's privileges unless the bond was reinstated or replaced. North Shore subsequently failed to effect reinstatement or replacement, and a termination notice issued on October 11, 1974.

The second replevin trial was held in October, 1974, before Justice Lynde. The court, in a written opinion held that:

(1) the previous decision by Justice DePaolo as to the validity of the "late remittance charges" for the April 30 and May 31, 1974, reporting periods was res judicata;

(2) that the "late remittance charges" for the July 10, 1974 period were proper;

(3) that because North Shore had incurred five"late remittance charges"within a twelve-month period, automatic suspension of North Shore by ATC was rightful and proper; and

(4) that the bank's actions in not honoring North Shore's checks was justifiable, and that the bank had not agreed to pay overdrafts.

North Shore subsequently appealed to the New York Appellate Division for the Second Department which affirmed Justice Lynde's decision. North Shore's motion for leave to appeal to the New York Court of Appeals on the ground that the New York replevin statutes, N.Y.C.P.L.R. §§7101 et seq., are unconstitutional was denied.

The hesitancy with which the courts should proceed before granting summary judgment has been consistently emphasized within this circuit, see Heyman v. Commerce and Industry Insurance Company, 527 F.2d 1317 (2d Cir. 1975), Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946). It is an extreme remedy demanding the clearest establishment of a



right to judgment before it is to issue. Ozark Milling Co. v. Allied Mills, Inc., 480 F.2d 1014, 1015 (8th Cir. 1973). Only where the record disclosed the absence of genuine issues as to material facts, and only issues of law remain is summary judgment proper. Heyman v. Commerce and Industry Insurance Company, supra at 1319-1320. The fact that cross-motions for the remedy are before the court does not lead to the conclusion that the standards should be lowered; the same caution should be employed, Heyman v. Commerce and Industry Insurance Company, supra at 1320. Applying the above notice principles to the instant matter, it is apparent that summary judgment is appropriate.

In Lowe v. International Air Transport Association Civil No. 69-4788 (S.D.N.Y. January 9, 1976), cited by plaintiff, the defendants' failure to consider relevant rebuttal evidence at a hearing to review a travel agency's suspension, and its subsequent failure to issue a particularized notice of termination was held to have exceeded the procedural guidelines of the Agency Agreement authorized by the CAB. Noting that courts have consistently demanded strict compliance with prescribed procedures in order that immunity attach, the court concluded that defendant's

failings served to deprive them of the statutory immunity otherwise afforded by 49 U.S.C. §1384. Plaintiff contends that certain conspiratorial acts between the ATC, the bank, and the insurance company enabled defendants to circumvent the prescribed procedures in terminating North Shore and that such acts exceeded the intended scope of CAB authorization. As such, plaintiffs argue, statutory immunity should be withdrawn and its claim for damages allowed.

North Shore once again raises allegations of a conspiracy between the ATC and Hempstead Bank to drive it out of business. Arguing the "suspicious" circumstances under which checks to the ATC were dishonored, plaintiff claims the"late remittance charges"and the suspension of July 29, 1974 were unwarranted. It is not necessary to once again recount the details cited by plaintiff in support of its assertion. This matter was fully litigated in the state courts. Justice Lynde found the checks were appropriately dishonored and that no agreement existed for the bank to pay overdrafts. Moreover, the Appellate Division specifically held that North Shore's allegations were founded on suspicion and not evidence. Hence the doctrine of res judicata bars relitigation of the claim. The fact that judgment was



rendered by a state court is not an impediment to the application of this rule as that judgment is entitled to full faith and credit. Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242 (1963).

Plaintiff, by affidavit of Frank Monello, sworn to June 1, 1976, suggests that ATC improperly applied pressure on the Insurance Company of North America to cancel the surety bond. North Shore argues that this alleged overreach permitted termination thereby circumventing review of the propriety of the suspension letter. Yet, plaintiff offers nothing in support of this bare allegation. A bald assertion is insufficient to raise a material issue of fact barring summary judgment. Rule 56(e) F.R.C.P. Nor can such an unsupported claim be the basis of an alleged antitrust violation.

North Shore further alleges the insufficiency of the termination notice. Plaintiff argues that the defendant's failure to remit the unused portion of the bond premium rendered termination ineffective. Defendant on the other hand, asserts the amount was deducted from the sum due and owing ATC because of the dishonored checks. This inconsistency, however, does not raise a material issue of fact. A failure to refund the unused amount at most gives

rise to a contract claim. Plaintiff, therefore, has failed to show that the procedural requirements of the Agreement have been breached by defendants and that immunity should fail.

North Shore also attacks the constitutionality of New York State's replevin statute. N.Y.C.P.L.R. §7101 et seq., and seeks the convening of a three-judge court to determine the issue. More specifically, plaintiff asserts that CPLR 7102(e) prescribing the undertaking to be furnished in a replevin action, fixing it at "not less than twice the value of the chattel stated in plaintiff's affidavit," violates the Equal Protection Caluse of the fourteenth amendment. Collateral issues having been litigated in the state court, it was entirely possible and wholly appropriate for plaintiff to have asserted this contention simultaneously. The doctrine of res judicata bars relitigation of issues that were or could have been tried in the initial action. Blankner v. City of Chicago, ' F.2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948, 95 S.Ct. 1678, rehearing denied, ___ U.S. ___, 95 S.Ct. 2618 (1975). North Shore's challenge to the validity of the state court judgment on constitutional grounds was available through application for certiorari

BEST COPY AVAILABLE



to review the New York Court of Appeals' denial of leave to appeal. See Mitchell v. W. T. Grant Co., 415 U.S. 600, 94 S. Ct. 1895 (1974).

For the reasons heretofore cited, defendants' motion for summary judgment is granted and plaintiff's cross-motion for partial summary judgment is denied, and it is

SO ORDERED.

s/JACOB MISHLER
U.S.D.J.